

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 11-30161-RGS

MARK MENARD

v.

CSX TRANSPORTATION, INC.

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

May 30, 2014

STEARNS, J.

Defendant CSX Transportation (CSX) filed its second motion for summary judgment on April 15, 2014. Dkt. #140. The court had denied CSX's prior motion for summary judgment after noting material disputes of fact that only a jury could resolve. *See* Dkt. #89.¹ CSX refiled the motion, claiming that new evidence, principally plaintiff Mark Menard's deposition (taken on November 25, 2013), establishes that Menard was neither trapped, nor in a position of peril when he was injured, and further, that even *if* Menard was trapped in a position of peril, there is no evidence from

¹ The court granted leave to CSX to file a second motion. This was in accordance with the court's September 23, 2013 scheduling order, giving CSX permission to file a successor motion for summary judgment if "additional discovery eradicates the material factual disputes identified by the court during the previous hearing." Dkt. #96.

which a jury could conclude that CSX employees were aware of his predicament and able to come to his aid.

After a further hearing and a review of the Menard deposition, the court again denies summary judgment. The court finds Menard's deposition testimony to be, in substance, consistent with the affidavit he previously submitted (attached as Exhibit M to defendant's motion), and thus the new testimony fails to eliminate the material factual disputes the court previously identified. Though the deposition may give CSX more fodder for cross-examination, the court is not in a position to make judgments of credibility as to disputed facts on a motion for summary judgment. If the jury believes Menard's account, it could plausibly conclude that his mental and physical state made it impossible for him to escape a near fatal injury.

ORDER

For the foregoing reasons, CSX's motion for summary judgment is DENIED.

SO ORDERED.

/s/ Richard G. Stearns
UNITED STATES DISTRICT JUDGE

